

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re)	Case No. S116670
)	
ANDERSON HAWTHORNE,)	Related Case Nos. S097160;
)	S065934; S004707;
Petitioner,)	Crim No. 25218
)	
On Habeas Corpus)	Los Angeles Superior Court
)	Case No. A36104
)	
)	

TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE

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In her Return to Order Show Cause and Memorandum of Points and Authorities in Support of Return (hereinafter “Return”), Respondent Jeanne Woodford, Director of the California Department of Corrections, contends that Petitioner Anderson Hawthorne has not established a prima facie case that he is mentally retarded because: (1) “a prerequisite for that status is an I.Q. score of 69 or below” (Return at 2); and (2) Petitioner “has revealed no significant adaptive deficits.” (Return at 3.)¹ As the following discussion will show, both of these arguments are incorrect.

¹In addition, Respondent complains that Petitioner’s counsel have denied Respondent’s counsel and their experts “complete and unrestricted access to Petitioner’s person and medical records for the purpose of independent evaluation.” (Return at 4.) In fact, Petitioner’s counsel requested that Respondent specify the experts she intended to use and the tests she intended to administer, but Respondent’s counsel refused to do so. Petitioner is entitled to an assurance that any tests Respondent conduct “bear some reasonable relation to measuring mental retardation, including factors that might confound or explain testing, such as malingering. Otherwise, there is a danger that [Petitioner] will be improperly subjected to mental examinations beyond the scope of the precise issue [he has] tendered and the[] resulting waiver of constitutional rights.” *Centeno v. Superior Court* (2004) 117 Cal.App.4th 30, 45. Upon request by Petitioner’s counsel, Respondent “must . . . submit a list of proposed tests to be considered by the [Petitioner] so that any objections may be raised before objecting begins.” *Id.* In light of Respondent’s refusal to do this, Petitioner’s counsel was fully justified in refusing to allow Respondent’s experts to examine Petitioner.

**I. PENAL CODE § 1376 DOES NOT REQUIRE
PETITIONER TO PRESENT AN INTELLIGENCE
QUOTIENT SCORE OF 69 OR BELOW AND
PETITIONER SUFFERS FROM SIGNIFICANTLY
SUBAVERAGE INTELLECTUAL FUNCTIONING**

Respondent's first argument, that Anderson Hawthorne cannot be mentally retarded because his counsel failed to present an intelligence quotient score of 69 or below, is wrong as a matter of law.² On October 8, 2003, the Governor of the State of California signed into law Senate Bill 3 (hereinafter "SB 3"), codified at Penal Code § 1376, which established the standards for assessment of mental retardation in capital cases within this State. Under Penal Code § 1376,

"mentally retarded" means the condition of significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested before the age of 18.

²In the Memorandum of Points and Authorities supporting the Return, Respondent's counsel goes even further, suggesting that Penal Code § 1376 should be read to require counsel to present an I.Q. score of 60 or less in order to establish Petitioner's mental retardation. (Return at 9-10.) For the reasons noted below, nothing in the language or the history of the statute, or in clinical definitions of mental retardation, would support such a novel interpretation of California law.

The enactment of SB 3 ended almost year of debate over the standards for mental retardation that should be employed in capital cases. A competing version, Senate Bill 51 (hereinafter “SB 51”), which was written by the California District Attorney’s Association, introduced by Senator Bill Morrow, and supported by Respondent’s counsel, would have provided: “An intelligence quotient of above 70 establishes a rebuttable presumption that the defendant is not mentally retarded.” (Senate Bill 51 at 2, proposing the enactment of Penal Code § 1376(a), available at http://www.leginfo.ca.gov/pub/bill/sen/sb_0051-0100/sb_51_bill_20030109_introduced.pdf.)

In contrast, SB 3, which was authored and introduced by Senator John Burton, rejected a specific I.Q. cutoff for mental retardation. In arguing for this different standard, Senator Burton stated that his definition was:

- (1) consistent with current Penal Code standards for mental retardation;
- (2) well-understood and accepted as a definition of mental retardation; and
- (3) “consistent with definitions of mental retardation of both the American Association on Mental Retardation (AAMR) and the American Psychiatric Association, both of which are noted in *Atkins*.” (SB 3 Senate Bill – Bill Analysis – Senate Floor, Sept. 3, 2003, at 8, available at http://www.leginfo.ca.gov/pub/bill/sen/sb_0001-0050/sb_3_cfa_20030909_113931_sen_floor

.html.) In the initial report on the bill by the Senate Committee on Public Safety, Senator Burton again noted that:

This definition is consistent with the definition used by the American Association of Mental Retardation and the American Psychiatric Association as cited in *Atkins*. (*Atkins id.*, FN 3 page 2245.) Both definitions refer to significant subaverage intellectual functioning. Neither definition refers to a specific I.Q.

(SB 3 Senate Bill – Bill Analysis – Senate Committee on Public Safety, February 11, 2003, at 7-8, available at http://www.leginfo.ca.gov/pub/bill/sen/sb_0001-0050/sb_3_cfa_20030211_135257_sen_comm.html.)

In opposing SB3, the California District Attorney's Association and Respondent's counsel objected to the lack of a fixed I.Q. cutoff score, contending that:

SB3 provides an overly-broad definition of mental retardation. The legislation fails to specify an IQ number as a threshold for determining retardation, despite the fact that the DSM-IV used by experts specifies an IQ of 70 or below. This deliberate omission of an IQ benchmark will undoubtedly lead to

death penalty defendants with IQs well above 70 attempting to improperly gain advantage under *Atkins*.

(SB 3 Senate Bill – Bill Analysis – Senate Floor, Sept. 3, 2003, at 9, available at http://www.leginfo.ca.gov/pub/bill/sen/sb_0001-0050/sb_3_cfa_20030909_113931_sen_floor.html.)

Eventually, in return for changes in those parts of SB3 that set forth procedures for determining mental retardation claims in trial proceedings, the California District Attorney’s Association and counsel for Respondent accepted SB3 as a whole, including its definition of mental retardation. (SB 3 Senate Bill – Bill Analysis – Senate Floor, Sept. 3, 2003, at 6, available at http://www.leginfo.ca.gov/pub/bill/sen/sb_0001-0050/sb_3_cfa_20030909_145834_sen_floor.html.)³

As enacted, Penal Code § 1376 eschews a fixed I.Q. cutoff score for mental retardation in favor of the more general clinical standards adopted by the AAMR and the American Psychiatric Association. For more than 50 years, the AAMR has established the most commonly accepted standards for assessing mental retardation. The AAMR’s 1992 Standards, which were

³Under these circumstances, accepting the arguments of Respondent’s counsel regarding a fixed IQ cutoff score would provide an unfair windfall, allowing Respondent’s counsel and other law enforcement agencies to obtain through litigation what they bargained away as part of the legislative process.

cited by the United States Supreme Court in the *Atkins* decision, define mental retardation as:

substantial limitations in present functioning characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; manifesting before age 18.

(AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS (9th Edition, 1992) (hereinafter “1992 AAMR Standards”) at 5.)⁴

Significantly subaverage intellectual functioning is further defined as

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⁴In 2002, the AAMR adopted revised standards for mental retardation that replaced the requirement of adaptive skill deficits in two of ten areas with a requirement of significant limitations in adaptive behavior as expressed in one of three areas: conceptual, practical or social skills, or by overall significant limitations in all three areas. (AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION AND SYSTEMS OF SUPPORTS (10th Edition, 2002) (hereinafter “2002 AAMR Standards”) at 73-76.)

as an IQ score of “approximately 70 to 75 or below.” (*Id.* at 5, 24, 35.)⁵

This range of scores, used instead of a fixed IQ cutoff:

acknowledges the importance of potential measurement error . . .

and the importance of professional judgment in individual cases.

It also represents concurrence with the need to move away

from the rigid use of standard deviations in determining a ceiling

for mental retardation because such standards imply a degree of

precision in measurement and construct that is not warranted.

(*Id.* at 36.)⁶

The American Psychiatric Association adopted the 1992 AAMR standards in its DIAGNOSTIC AND STATISTICAL MANUAL OF PSYCHIATRIC DISORDERS (4th Ed. Text Revision, 2000) (hereinafter “DSM-IV-TR”).

The definition contained in the DSM IV-TR is identical to the one contained

⁵The 2002 standards adopted similar standards which it noted “expand the operational definitions of mental retardation to 75, and that score of 75 may still contain measurement error.” (2002 AAMR Standards at 58.)

⁶The 2002 standards similarly note:

It is clear that neither [the APA nor the AAMR] intends for a fixed cutoff point for making the diagnosis of mental retardation. Both specify consideration of adaptive skills and the use of clinical judgment.

(2002 AAMR Standards at 58.)

in the 1992 AAMR Standards, and the DSM IV-TR specifically cross references those standards. (DSM IV-TR at 41, 48.) The American Psychiatric Association also rejected a fixed IQ cutoff score for mental retardation, noting that:

Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below [using a standardized individually administered IQ test] . . . It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument (e.g., a Wechsler IQ of 70 is considered to represent a range of 65-75). Thus, it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.

(*Id.* at 41.) As noted by Senator Burton in his official statements in support of SB 3, the *Atkins* decision itself quoted directly from the DSM IV-TR and 1992 AAMR Standards, specifically noting that “‘Mild’ mental retardation is typically used to describe people with an IQ level of 50-55 to

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*approximately 70.” (Atkins v. Virginia (2002) 536 U.S. 304, 309 n. 3, quoting DSM IV-TR at 43 (emphasis added).)*⁷

Both the legislative history and language of Penal Code § 1376 are clear: In enacting this section, the Legislature adopted commonly accepted clinical definitions of mental retardation. Under these definitions, “it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.” (DSM IV-TR at 41.) Under these standards, Petitioner’s I.Q. scores of 71 (by Dr. Michael Maloney in 1983) and 75 (by Dr. Dale Watson in 1995) meet the intellectual criterion for mental retardation. (Exhibit 1, Declaration of Dale Watson, Ph.D., ¶¶ 75, 96-97; Exhibit 2, Letter From Michael Maloney, Ph.D., to Albert DeBlanc, Jr. dated October 12, 1983.)⁸

⁷The *Atkins* majority understood that this definition reflects a range for mental retardation, rather than a fixed IQ cutoff score, noting:

It is estimated that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.

Atkins, 536 U.S. at 309 n. 5 *citing* 2 B. SADOCK & V. SADOCK, COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 2952 (7TH ED. 2000).

⁸In addition to the four exhibits submitted in support of the Petition for Writ of Habeas Corpus, referred to herein as Exhibits 1-4, Petitioner has attached a number of additional exhibits, attached hereto as Exhibits 5 through 10.

II. PETITIONER HAS DEFICITS IN ADAPTIVE BEHAVIOR THAT MANIFESTED BEFORE AGE 18

In addition, contrary to the allegations contained in the Return, Petitioner suffered from significant deficits in adaptive functioning from childhood onwards. The Return consistently mischaracterizes the nature and extent of these deficits.

Petitioner's deficits in communication are far more serious than mere allegations that Petitioner "'talks softly and low in volume' and his speech content is 'concrete.'" (Return at 3.) As defined by the AAMR, communication skills include the ability to comprehend and express information given verbally (orally and in writing) and non-verbally. (1992 AAMR Standards at 40.) From childhood onwards, Petitioner had significant deficits in this area.

From a very young age, Petitioner was extremely uncommunicative, mispronounced simple words, would not start conversations with others, had severe difficulties understanding what others were saying to him and verbally expressing his thoughts, concerns and emotions. (Exhibit 5, Declaration of Angela Selma dated March 23, 2004, ¶¶ 3, 6a-8, 10; Exhibit 6, Declaration of Rose Norris, dated March 24, 2004, ¶¶ 3, 25; Exhibit 7, Declaration of Grady Smith, ¶ 11.) At school, Petitioner responded

to requests for information with one word answers and understood very little of what his teachers were attempting to convey to him. (Exhibit 6, Declaration of Rose Norris, dated March 24, 2004, ¶¶ 3-14.) He had great difficulty reading and could not write, aside from his name and the date. (*Id.* at ¶¶ 5-6, Exhibit 7, Declaration of Grady Smith, ¶ 10.) At age twelve, Petitioner could only say his ABCs to the letter M before he became confused and Petitioner didn't know his address or his phone number. (Exhibit 6, Declaration of Rose Norris, dated March 24, 2004, ¶¶ 7, 16.)

At seventeen, when Petitioner visited his relatives in Memphis, Tennessee, he remained withdrawn and unable to carry on a conversation; his relatives commented that much of what Petitioner said didn't make any sense and he still couldn't write. (Exhibit 3, Declaration of Yvette Guerrero, Ph.D. at ¶¶ 48-49; Exhibit 8, Declaration of Deborah Vaughn Campbell, ¶ 10.) Later, when Petitioner was imprisoned at Duell Vocational Institute, he was still illiterate. (Exhibit 9, Declaration of Renaldo Williams, ¶ 2.) At trial, Petitioner failed to even understand that he was sentenced to death; Petitioner informed his friend Grady Smith that he "got double life sentences plus fifty years . . . I don't think he even understood what the sentence was about." (Exhibit 7, Declaration of Grady Smith, ¶ 60.)

The deficits in Petitioner's communication skills were significant from childhood onward.

Petitioner also suffered serious deficits in social skills. As defined by the AAMR, social skills include: initiating, interacting, and terminating interactions with others; receiving and responding to social cues; being aware of peers and peer acceptance; assessing others; forming and fostering love and friendships; coping with demands from others; and controlling impulses. (1992 AAMR Standards at 40.) Petitioner's relatives, friends and teachers have consistently described Petitioner's extreme social withdrawal, his difficulty in understanding basic social conventions (such as not speaking loudly during church services), Petitioner's gullibility and his seeming inability to understand and interact with others. (Exhibit 3, Declaration of Yvette Guerrero, Ph.D. at ¶¶ 48-49; Exhibit 5, Declaration of Angela Selma dated March 23, 2004, ¶¶ 3-8, 13-15; Exhibit 6, Declaration of Rose Norris, dated March 24, 2004, ¶¶ 3, 25.)

Contrary to Respondent's allegations, Petitioner's social skills are not demonstrated by his involvement in gangs or the crimes with which he was convicted. Petitioner's fellow gang members, no less than other witnesses, commented on how withdrawn Petitioner was, what a difficult time Petitioner had in conversing and making himself understood, and

how isolated he was. (Exhibit 7, Declaration of Grady Smith, ¶¶ 10-11; Exhibit 9, Declaration of Renaldo Williams, ¶¶ 8-10.)

As described by his relatives and teachers, Petitioner had significant deficits in community use. Community use includes transportation, shopping, and purchasing services. (1992 AAMR Standards at 40.) Up to age 12 at least, Petitioner couldn't count pocket change, use a library, or read street names. (Exhibit 5, Declaration of Angela Selma dated March 23, 2004, ¶ 12; Exhibit 6, Declaration of Rose Norris, dated March 24, 2004, ¶¶ 16-18.) Petitioner also had significant deficits in functional academics. Functional academics includes writing, reading, basic math, basic science and other academic subjects as they relate to the ability to function independently in society. (1992 AAMR Standards at 41.) At age 12, Petitioner could only write his name and the date, couldn't find his state, country or street on a map, and couldn't borrow in simple subtraction or regroup in simple addition. (Exhibit 6, Declaration of Rose Norris, dated March 24, 2004, ¶¶ 6-9.) At age 17, Petitioner was still unable to write. (Exhibit 8, Declaration of Deborah Vaughn Campbell, ¶ 10.)

Petitioner had significant deficits in leisure skills. As defined by the AAMR, leisure skills includes the ability to choose and self-initiate leisure interests, enjoying recreational activities alone and with others, playing with

others, and taking turns. (1992 AAMR Standards at 41.) Petitioner had no interests or hobbies, didn't play organized sports or games that had rules that he needed to follow, couldn't participate in board games, and didn't participate in church or community activities. (Exhibit 5, Declaration of Angela Selma, dated March 23, 2004, ¶¶ 13-15; Exhibit 6, Declaration of Rose Norris, dated March 24, 2004, ¶¶ 19, 21.) Petitioner had few if any leisure activities that he felt comfortable participating in, apart from playing with his dogs. (Exhibit 5, Declaration of Angela Selma, dated March 23, 2004, ¶ 14; Exhibit 10, Declaration of Elaine Vaughn, ¶ 13.)

Petitioner's significant, demonstrated deficits in at least five adaptive skill areas satisfies the adaptive skill criteria for mental retardation under the 1992 AAMR Standards and DSM IV-TR, both of which require the presence of significant deficits in at least two adaptive skill areas. (1992 AAMR Standards at 73-76; DSM IV-TR at 41.)⁹

Moreover, contrary to Respondent's arguments, the fact that Petitioner was able to assist his mother and his mentally ill brother, or that Petitioner was able to feed and clothe himself, does not preclude

⁹Petitioner's adaptive deficits in conceptual and social skills also meet the adaptive deficit criteria contained in the 2002 AAMR Standards, which require the presence of significant deficits in one of three areas of adaptive behavior. (2002 AAMR Standards at 73-76.)

a conclusion that Petitioner is mentally retarded. In its International Classification of Diseases and Related Health Problems, Tenth Edition (ICD-10), the World Health Organization has recognized that while mild mental retardation is “[l]ikely to result in some learning difficulties in school Many adults will be able to work and maintain good social relationships and contribute to society.” (2002 AAMR Standards at 104, *quoting* WORLD HEALTH ORGANIZATION, INTERNATIONAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS (10th Ed. 1993).)

CONCLUSION

Contrary to the allegations contained in the Traverse, Petitioner has established a prima facie case on his claim of mental retardation, and is entitled to a hearing on this issue.

DATED: May 3, 2004

Respectfully submitted,

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Supervising Deputy Federal Public Defender

By: _____

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Deputy Federal Public Defender

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PROOF OF SERVICE

I, the undersigned, declare that: I am employed in Los Angeles County, California; my business address is the Federal Public Defender's Office, 321 East Second Street, Los Angeles, California 90012-4202; I am over the age of eighteen years; I am not a party to the action entitled below; I am employed by the Federal Public Defender for the Central District of California, who is a member of the bar of the United States District Court for the Central District of California, and at whose direction I served a copy of the attached **TRAVERSE TO RETURN TO ORDER TO SHOW CAUSE** on the following individual(s), addressed as follows, by:

<input type="checkbox"/> Placing same in a sealed envelope for collection and interoffice delivery:	<input type="checkbox"/> Placing same in an envelope for hand-delivery:	<input checked="" type="checkbox"/> Placing same in a sealed envelope for collection and mailing via the United States Post Office:	<input type="checkbox"/> Faxing same via facsimile machine:
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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

This proof of service is executed at Los Angeles, California, on
May __, 2004.

Patricia Jacobson

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EXHIBITS

- Exhibit 5 Declaration of Angela Selma dated March 23, 2004
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